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ABDUL RAHIM ABDUL HAMID & ORS

v.

PERDANA MERCHANT BANKERS BHD & ORS

B

FEDERAL COURT, PUTRAJAYA
PAJAN SINGH GILL FCJ
ALAUDDIN MOHD SHERIFF FCJ
RICHARD MALANJUM FCJ
[CIVIL APPEAL NO: 02-12-2005 (W)]

C

7 APRIL 2006

BANKING: *Banker and customer - Duty of care - Implied duty to take reasonable skill and care in executing customer's orders*

D

BANKING: *Banker and customer - Contractual relationship - Commencement of relationship - Whether negotiations without agreement can establish relationship*

CIVIL PROCEDURE: *Appeal - Fact, findings of - Distinction between finding of fact based on credibility of witnesses and finding of fact based upon inferences drawn from other facts - Whether appellate court more ready to interfere with findings of fact based on credibility of witnesses - Whether appellate court must make distinction as to nature of findings*

E

COMPANY LAW: *Receivership - Appointment of receiver and manager - Where borrower's financial problems caused by the lender - Whether appointment of receiver and manager can be set aside*

F

The main issue in this case was whether the 1st respondent (a financial institution), in executing an order to transfer money, had done so in an unauthorized manner. A loan facility of RM20 million had been granted by the 1st to 6th respondents to the 5th appellant to finance its project. After a series of negotiations, the 5th appellant and the 1st respondent had agreed on a working draft dated 1 June 1992 for the purposes of the said loan facility. The working draft was borne out of months of negotiations on the understanding that all the clauses eventually agreed upon in the said document would be incorporated into the facility agreement and both parties had placed considerable importance on it.

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The facility agreement was subsequently entered into on 30 June 1992 between the 5th appellant and the 1st respondent, wherein most of the terms of the working draft were incorporated, save for one very pertinent clause *ie,* cl. 5(e) of the said facility agreement.

I

Clause 5(e) authorised the disbursement of the whole of the said loan facility in one draw down. The 1st respondent relying on this clause disbursed the whole of the said loan facility in one draw down. The 5th appellant's main complaint was that this draw down, in one full swoop, went against the spirit of the working draft, wherein it was stated that there would be two draw downs of the loan sum. The 5th appellant claim that this variation of the terms was a breach.

The 1st respondent contended that the facility agreement was signed by the 5th appellant and that the 5th appellant was bound by the facility agreement despite the substantial variation with the working draft. The 1st respondent who drew up the facility agreement had not mentioned to the 5th appellant that there was going to be a variation, and left it to the 5th appellant to detect the variation when they signed the agreement. The 5th appellant contended that they were lulled into believing that the terms of the facility agreement were going to be the same as the terms contained in the working draft. Hence, they chose not to scrutinize the said facility agreement with the care it deserved.

The 7th respondent was appointed as receiver and manager of the 5th appellant, pursuant to the terms of a debenture executed between the 1st respondent and the 5th appellant. The learned Judicial Commissioner found in favour of the respondents. Upon appeal, the Court of Appeal endorsed the findings of the trial judge and hence this appeal.

Held (allowing the appeal with costs)
Per Pajan Singh Gill FCJ:

(1) A distinction has to be made between a finding on a specific fact which relies on the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion, than in the case of the former. Nevertheless, an appellate court cannot in a peremptory fashion say, because it is an assessment of facts of a trial judge against the oral and written evidence presented before him, they are not prepared to interfere with such a finding of fact, without even making any distinction as to the nature of the findings. It is only after an analysis of the evidence afresh, and on a review of the law

A can such a finding be made by an appellate court. Without this approach, the endorsement of the appellate court, deserves little or no weight at all. (para 18)

(2) There was an elementary obligation on the part of the 1st B respondent, as bankers to inform the 5th appellant, as customers of theirs, of the substantial change that they had inserted in the facility agreement. The bank had in this case, executed the facility agreement by shutting its eyes to the obvious fact that they had varied the facility agreement, C without the consent of the 5th appellant. DW1 relied upon and trusted PW2 at the material time. There was also no evidence adduced that PW2 had advised DW1 to seek for independent advice prior to the execution of the facility agreement. (para 24)

D **(3)** The 'relationship of banker and customer begins the moment the parties enter into relationships or negotiations which are considered part of the contract, ultimately concluded. The negotiations must be part of the process and lead directly to agreement; negotiations without agreement cannot establish E the relationship'. Prior to the execution of the facility agreement there was negotiation as evidenced by the working draft and which terms were supposed to be incorporated into the facility agreement. Hence, even before the execution of the facility agreement there was already a relationship formed F between the parties. Failure by PW2 to inform DW1 on the variations made or the departure from the agreed terms in the working draft amounted to a fundamental breach of duty of care on the part of PW2 and vicariously, the 1st respondent. (para 24)

G **(4)** It is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing customer's orders. (para 28)

H **(5)** It was as a consequence of the breaches of the respondents that the 5th appellant suffered financial problems. Hence, the appointment of the receiver and manager on the assets of the 5th appellant was caused entirely by the wrong doings of the respondent themselves. They cannot profit from their own I wrongs. The appointment of the receiver and manager was therefore injudicious and should be set aside. (para 62)

Bahasa Malaysia *translation of headnotes*

Isu utama dalam kes ini adalah sama ada respondent pertama (satu institusi kewangan) dalam melaksanakan satu perintah untuk memindahkan wang, telah melakukannya dalam cara yang tidak dibenarkan. Satu kemudahan pinjaman sebanyak RM20 juta telah diberikan oleh responden-responden pertama hingga keenam kepada perayu kelima untuk membiayai projeknya. Selepas satu siri rundingan, perayu kelima dan respondent pertama telah bersetuju dengan satu deraf kerja bertarikh 1 Jun 1992 untuk tujuan kemudahan pinjaman tersebut. Deraf kerja itu adalah hasil rundinga yang telah dijalankan selama berbulan-bulan lamanya atas kepercayaan bahawa kesemua klausa yang pada akhirnya dipersetujui di dalam dokumen itu akan dimasukkan di dalam Perjanjian Kemudahan dan kedua-dua pihak telah menganggapnya sebagai amat penting.

Perjanjian Kemudahan itu telah kemudiannya dimasuki pada 30 Jun 1992 di antara perayu kelima dan responden pertama, di mana hampir keseluruhan terma-terma di dalam deraf kerja tersebut telah dimasukkan, kecuali satu terma yang sangat penting iaitu kl. 5(e) Perjanjian Kemudahan tersebut. Klausa 5(e) membenarkan pembayaran keluar keseluruhan kemudahan pinjaman tersebut secara sekaligus. Responden pertama, bergantung kepada klausa ini telah membayar keluar keseluruhan kemudahan pinjaman tersebut secara sekaligus. Aduan utama perayu kelima adalah bahawa pembayaran keluar ini secara sekaligus, adalah bertentangan dengan niat deraf kerja tersebut, di mana telah dinyatakan bahawa pembayaran keluar amaun pinjaman itu akan dilakukan secara dua kali bayaran. Perayu kelima mengatakan bahawa variasi kepada terma ini adalah satu kemungkiran.

Responden pertama telah berhujah bahawa Perjanjian Kemudahan itu telah ditandatangani oleh perayu kelima dan bahawa perayu kelima adalah terikat dengan Perjanjian Kemudahan tersebut tidak kira variasi yang besar dengan deraf kerja itu. Responden pertama yang telah menderafkan Perjanjian Kemudahan itu telah tidak memberitahu perayu kelima bahawa terdapat variasi tersebut, dan telah membiarkannya kepada perayu kelima untuk mengecam variasi tersebut apabila mereka menandatangani perjanjian tersebut. Perayu kelima berhujah bahawa mereka telah dibawa kepada kepercayaan bahawa terma-terma Perjanjian Kemudahan itu adalah sama dengan terma-terma yang terkandung di dalam deraf kerja

A tersebut. Oleh itu mereka telah mengambil keputusan untuk tidak meneliti Perjanjian Kemudahan tersebut, sepertimana yang mereka sepatutnya lakukan.

Responden ketujuh telah dilantik sebagai penerima dan pengurus
B untuk perayu kelima, lanjutan daripada terma-terma satu debentur yang telah dimasuki di antara respondent pertama dan perayu kelima. Pesuruhjaya Kehakiman yang bijaksana telah mmutuskan berpihak kepada respondent-responden. Apabila dirayu, Mahkamah Rayuan telah mengesahkan penemuan-penemuan hakim perbicaraan
C dan justeru rayuan ini.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Pajan Singh Gill HMR:

(1) Perbezaan harus dilakukan di antara satu penemuan ke atas
D fakta spesifik yang bergantung kepada kredibiliti saksi-saksi dan satu penemuan fakta yang bergantung kepada inferens yang didapati daripada fakta-fakta lain. Dalam kes yang terkemudian, mahkamah rayuan akan lebih bersedia untuk bercampurtangan dengan penemuan fakta oleh hakim perbicaraan dan
E membentukkan pendapatnya sendiri, berbanding dengan kes yang terdahulu itu. Walau bagaimanapun, sebuah mahkamah rayuan tidak boleh dalam cara peremtori mengatakan, oleh kerana ianya adalah satu penilaian fakta-fakta oleh hakim perbicaraan terhadap keterangan lisan dan bertulis yang
F dikemukakan kepadanya, mereka tidak bersedia untuk bercampurtangan dengan penemuan fakta yang sedemikian, dengan tanpa membuat apa-apa perbezaan mengenai sifat penemuan-penemuan itu. Hanya selepas menganalisa semula keterangan itu, dan selepas mengkaji semula undang-undang,
G satu penemuan berikut boleh dibuat oleh mahkamah rayuan. Sekiraya cara ini tidak digunakan, pengesahan oleh mahkamah rayuan adalah tidak kukuh.

(2) Terdapat kewajipan yang asas pada pihak responden pertama,
H sebagai ahli perbankan untuk memberitahu perayu kelima sebagai pelanggan mereka, mengenai perubahan penting yang telah mereka masukkan ke dalam Perjanjian Kemudahan itu. Pihak bank telah dalam kes ini menandatangani Perjanjian Kemudahan itu dengan menutup matanya kepada fakta yang
I jelas bahawa mereka telah membuat variasi kepada Perjanjian Kemudahan itu, tanpa mendapatkan kebenaran perayu kelima. DW1 telah bergantung kepada dan telah mempercayai PW2

pada masa yang material itu. Juga tiada keterangan dikemukakan yang menunjukkan bahawa PW2 ada menasihati DW1 supaya mendapatkan nasihat bebas sebelum menandatangani Perjanjian Kemudahan itu.

(3) Perhubungan bank dan pelanggan bermula pada saat pihak-pihak memasuki satu perhubungan atau rundingan yang dianggap sebagai sebahagian daripada satu kontrak, yang mana pada akhirnya ditandatangani. Rundingan itu mestilah sebahagian daripada proses dan membawa secara terus-menerus kepada perjanjian; rundingan tanpa perjanjian tidak boleh mewujudkan satu perhubungan. Sebelum penandatanganan Perjanjian Kemudahan itu, terdapat rundingan seperti yang dibuktikan oleh deraf kerja tersebut dan terma-terma yang mana sepatutnya dimasukkan ke dalam Perjanjian Kemudahan tersebut. Oleh itu, sebelum penandatanganan Perjanjian Kemudahan itu telah terdapat satu perhubungan yang terjalin di antara pihak-pihak. Kegagalan PW2 untuk memberitahu DW1 mengenai variasi yang telah dibuat atau penyimpangan daripada terma-terma yang dipersetujui di dalam deraf kerja adalah satu kemungkiran fundamental kewajipan berjaga-jaga pada pihak PW2 dan secara vikarius responden pertama.

(4) Adalah terma tersirat dalam kontrak di antara bank dan pelanggan bahawa bank akan menggunakan kemahiran dan tanggungjawab yang munasabah dalam dan berkenaan dengan melaksanakan perintah pelanggan.

(5) Adalah akibat kemungkiran-kemungkiran responden-responden yang membuat perayu kelima mengalami masalah kewangan. Oleh itu, pelantikan penerima dan pengurus ke atas aset-aset perayu kelima telah diakibatkan sepenuhnya oleh salahlaku responden-responden sendiri. Mereka tidak boleh mengaut keuntungan daripada salahlaku mereka sendiri. Oleh itu, pelantikan penerima dan pengurus adalah tidak adil dan perlu diketepikan.

Case(s) referred to:

Barclays Bank plc v. Quincecare Ltd [1992] 4 All ER 363 ***(refd)***

China Airlines Ltd v. Maltran Air Corp Sdn Bhd [1996] 3 CLJ 163 FC ***(refd)***

Eng Thye Plantations Bhd v. Lim Heng Hock & Ors [2001] 4 CLJ 245 CA ***(refd)***

Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd [1984] l MLJ 243 [1983] 2 CLJ 187; [1983] 1 CLJ (Rep) 186 FC ***(refd)***

A *Lipkin Gorman (a firm) v. Karpnale Ltd and Another [1992] 4 All ER 409* ***(refd)***
Prenn v. Simonds [1972] 1 WLR 1381 ***(refd)***
Sivalingam Periasamy v. Periasammy & Anor [1996] 4 CLJ 545 CA ***(refd)***

B *For the appellants - Wong Kim Fatt (Satish Nair & Wong Boon Lee with him); M/s Gulam & Wong*
For the 1st -6th respondents - Wong Chong Wah (Wong Chee Lin with him); M/s Skrine
For the 7th respondent - N Chandran; M/s Albar & Partners

C *[Appeal from Court of Appeal; Civil Appeal No: W-02-106-2001]*

Reported by Amutha Suppayah

D **JUDGMENT**

Pajan Singh Gill FCJ:

[1] Leave was granted by this Honourable Court on 15 August 2005 to the appellants, upon the following questions of law:

E 1. (a) Whether, as a matter of law, it is open to and in conformity with justice for the High Court or the Court of Appeal to find that the three relevant certificates in a drawing notice (Schedule 4 in the present case) were available on the date of the notice or date of the release of the loan granted
F to the borrower, when the undisputed evidence of all the witnesses for the lender and borrower shows that these three certificates were in fact or in reality, not available on the material date when the certificate of the project consultants
G was issued about four months after the release of the loan.

(b) Whether, as a matter of law and in the interest of justice, in the event that the Federal Court finds that the above three certificates were in fact or in reality not available on the date of the drawing notice or on the date when the loan was
H released the Court of Appeal or the Federal Court has a duty to interfere with the erroneous findings of the trial judge that the three certificates were available when they were not available.

I 2. Whether, as stated at the trial by the witnesses of the 1st respondent and the 5th appellant, the changing or variation by the 1st respondent as lenders from two draw downs of the loan to one single full draw down without the consent or

agreement of the 5th appellant as the borrower constitutes a breach of contract and duty of care on the part of the 1st respondent. A

3. Whether failure by the 1st respondent as lender to make a valid demand to recall the Performance Guarantee given by a bank in Germany, where the applicable law was German Law, constitutes negligence or failure to exercise reasonable skill and care on the part of the lenders. B

4. Whether, in the event that the 1st to 6th respondent are found to have acted negligently and in breach of the contract, they were entitled to appoint the 7th respondent as receiver and manager over the assets of the 5th appellant, in the circumstances. C

Background Of The Case D

[2] There were 2 consolidated suits in this appeal, namely Kuala Lumpur Court Civil Suit No. D1 (D9) 22-501-1994 and Johor Bahru High Court Civil Suit No. 22-98-1994. Both these suits were heard before the Judicial Commissioner, who made the following orders: E

– The learned Judicial Commissioner dismissed the claim of the present 5th appellant, the borrower as against the 1st respondent, the lender. F

– The learned Judicial Commissioner allowed the counterclaim of the 1st respondent as against the 5th appellant.

– The learned Judicial Commissioner dismissed the claim of the 5th appellant against one Lim Tian Huat, the 7th respondent, who acted as Receiver and Manager of the 5th appellant, pursuant to the terms of a debenture executed between the 1st respondent and the 5th appellant. G

– Finally, the learned Judicial Commissioner allowed the claim of the 1st to 6th respondent as against the 1st to 4th appellants as guarantors of the loan facility granted by the 1st respondent to the 5th appellant. H

[3] The convenient way of approaching this case is to first sketch the background, and then to examine defences pleaded by the 5th appellant, Carah Enterprise Sdn. Bhd. I

[4] At the risk of oversimplifying, but in order to provide a framework for a sketch of the background, we state at the outset that the most substantial issue in this case is whether the 1st respondent a financial institution in executing an order to transfer money, had done so in unauthorized manner. It is therefore, necessary to examine the contemporary documents and the oral evidence, with considerable care.

[5] The facts basically revolved on a loan facility of RM20 million granted by the 1st to 6th respondent to the 5th appellant to finance its project for purchasing a Cold Storage with Tube Ice Factory and Machinery to process pineapples from a company in Germany named Rheinhold & Mahla (R&M).

[6] After a series of negotiations and with the participation of other financial institutions, the 5th appellant and the 1st respondent had agreed on a working draft for the purposes of the said loan facility. The working draft is dated 1 June 1992 and deserves reproduction:

Term Loan Lenders	the A Lenders and the B Lenders;
Tranche I of the Term Loan Facility	**a sum not exceeding Ten Million Ringgit** (RM10,000,000.00) **out of the Term Loan Facility which may only be used for the purpose set out in clause 2.2(b);** (emphasis is ours)
Tranche II of the Term Loan Facility	**a sum not exceeding Ten Million Ringgit** (RM10,000,000.00) **out of the Term Loan Facility which may only be used for the purpose set out in clause 2.2(c);** (emphasis is ours)
Utilisation Notice	a notice of utilization duly completed and signed by the Borrower, substantially in the form set out in Schedule 4A.

[7] It must be borne in mind, that from the evidence led by the parties, the working draft was not some non-sequiter document, but one that both parties had placed considerable importance on. It was from our observation of the evidence, a document

borne out of months of negotiations on the understanding that all the clauses eventually agreed upon in the said document would be incorporated into the facility agreement.

[8] This facility agreement was subsequently entered into, on 30 June 1992, between the 5th appellant and the 1st respondent, wherein most of the terms of the working draft were incorporated, save for one very pertinent clause, That was cl. 5(e) of the said facility agreement. Clause 5(e) reads as follows:

> (e) All fees and expenses due and payable under clause 17 have been paid in full by the Borrower, then, subject to the provisions of this Agreement, the Borrower may on Business Days during the Availability Period but not thereafter make only one **(1) Drawing on the Facility.** (emphasis is ours)

[9] Pursuant to this said clause in the facility agreement which the 1st respondent relied on, they disbursed the whole of the said loan facility in one draw down. The 5th appellant's main complaint was that this draw down, in one full swoop, went against the spirit of the working draft, that had been agreed upon by both the 1st respondent and the 5th appellant, wherein it was stated that there would be two draw downs of the loan sum. Herein, lies the breach, contends the 5th appellant.

[10] The 1st respondent on the other hand, contends that the remittance was pursuant to the facility agreement dated 30 June 1992. This facility agreement, resulted from a culmination of all the negotiations between the parties, which seemingly took into account the working draft. It however had a vital variation in it. The 5th appellant signed, the facility agreement despite the variation. To that end, the 5th appellant is bound by the facility agreement of 30 June 1992, despite this substantial variation.

[11] Was the variation brought to the attention of the 5th appellant?

[12] The 1st respondent who was responsible for drawing up the facility agreement, had not mentioned to the 5th appellant that there was going to be a variation, and left it to the 5th appellant to detect the variation when they signed the said facility agreement. In fact, from the evidence of DW1, he was caught up at the material time with the ceremony to sign the facility agreement and was told by PW2 then, that there was no change

in the facility agreement from what was agreed upon in the working draft. Believing this to be true and not doubting the words of PW2, DW1 signed the facility agreement.

[13] The 5th appellant contends that they were lulled into believing that there was going to be no amendment to the facility agreement, as the terms were agreed to, in the working draft, and it was only a question of incorporating the said terms into the facility agreement. Hence, they chose not to scrutinize the said facility agreement, with the care it deserved.

Findings Of The Learned Trial Judge In This Respect

[14] The learned trial judge had dismissed the evidence of DW1, for the 5th appellant, that he had not scrutinized the facility agreement, as an act of sheer naivety on his part. The learned trial judge, poured scorn over the evidence of DW1, that he was busy preparing his speech for the signing ceremony of the facility agreement, and hence he overlooked the fine print of the facility agreement. The learned trial judge had gone on to hold that it was a colossal error on the part of DW1 in not scrutinizing the said facility agreement, and therefore the error was his alone to bear.

[15] The learned trial judge had however, not dismissed the fact that DW1 was not informed by the 1st respondent that there was such a variation in the facility agreement nor the fact that PW2 had in fact informed DW1, prior to the signing of the facility agreement that the terms of the facility agreement were the same as the contents of the working draft of 1 June 1992. To the trial judge, none of this made a jot of difference. The fact remained that DW1 should have exercised more care and scrutinized the facility agreement before signing it.

[16] The trial judge has also gone on to hold that the said working draft was of no material importance, as it was merely a pre-contract negotiation that had no bearing on the eventual facility agreement. The cases of *Prenn v. Simonds* [1972] 1 WLR 1381 and *Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd* [1983] 2 CLJ 187; [1983] CLJ (Rep) 186, were cited in support by him.

[17] The learned trial judge had also expressed his views that it was inconceivable for disbursements to be made in the manner provided for in the working draft, as art. 3 of the contract between the 5th appellant and Messrs. Rheinhold & Mahla (R&M)

had stated that payment of the contract is 100% (hundred percent) of the project value against the invoice certified by SGS Control Co. m.b.H. For the record, it was pursuant to this contract that the facility was granted to the 5th appellant by the 1st respondent.

Our Findings In This Respect

[18] We have had to reassess the entire facts of this case, as there was precious little analysis of the evidence by the intermediate court. We find the approach of the Court of Appeal, which merely endorsed the findings of the trial judge because they were findings of fact, slightly discomfiting. We wish to state that we are well aware of the settled principle that a trial court is in a more advantageous position to make findings of fact and assessing the credibility of witnesses, hence generally as an appellate court we will not interfere with a decision which is based on such findings of fact unless there is a clear justification for doing so. Further, a distinction has to be made between a finding on a specific fact which relies on the credibility of witnesses and a finding of fact which depends upon inferences drawn from other facts. In the latter case, an appellate court will more readily interfere with the trial judge's findings of fact and form an independent opinion, than in the case of the former. (See *China Airlines Ltd. v. Maltran Air Corp. Sdn. Bhd.* [1996] 3 CLJ 163). Having said the foregoing we are also of the view that an appellate court cannot in a peremptory fashion say, because it is an assessment of facts of a trial judge against the oral and written evidence presented before him, they are not prepared to interfere with such a finding of fact, without even making any distinction as to the nature of the findings. It is only after an analysis of the evidence afresh, and on a review of the law can such a finding be made by an appellate court. Without this approach, the endorsement of the appellate court, deserves little or no weight at all. It would not be amiss on our part as well as if we refer to the cases of *Eng Thye Plantations Bhd. v. Lim Heng Hock & Ors* [2001] 4 CLJ 245 and *Sivalingam a/l Periasamy v. Periasammy & Anor* [1996] 4 CLJ 545 where ironically, the same appellate judge had this to say on appellate assessment:

> We are fully conscious that this is an appeal that turns upon a question of fact. However, a careful reading of the trial judge's judgment shows that the process of reasoning adopted by him for preferring the evidence of the Defence witnesses is based upon a

A wrong premise and does not accord with a well- settled principle that goes to form the fulcrum upon which the scales of procedural justice turn.

First, the trial judge appears to have completely overlooked the inherent probabilities of the case. Evidence was led to prove that
B the plaintiff was a person who had a history of following orders given to him by those who held him in their custody, including the first respondent. Indeed the plaintiff testified, without challenge, of the dire consequences that would ensure from disobedience. All this evidence was entirely accepted by the defendants. Yet, the
C defendants' case was that on this occasion the plaintiff had willfully disobeyed an express order given to him. The question which the trial judge ought to have asked himself is whether it was inherently probable that the plaintiff, on this isolated instance, would have dared disobey an express order given to him not to climb the tree. Had he done so, he would, upon a proper
D assessment of the totality of the evidence, have come to the conclusion that the defence story was wholly improbable.

So, here we have a case where there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him. And of the principles that should govern such
E a case as the present there is no doubt.

It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the
F evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

G **[19]** From the dicta cited above it is evident that an assessment of facts must be undertaken before an appellate court decides whether to intervene or not. Hence the approach of the appellate court in this instance in merely endorsing the finding of the trial judge without a critical assessment of the evidence goes against
H the grain of these authorities.

[20] Reverting to the matter at hand, we find that the attitude of the trial judge in respect of the evidence of DW1, reproachable.

Why?

I

[21] The trial judge had dismissed the reasons why DW1 signed the facility agreement despite the variation as an act of, singular foolhardiness. That may be so. We are not denying the fact that it was an act of imprudence on his part. However, one must also consider the background to this saga. DW1 was under the impression that the facility agreement would mirror the working draft that the 5th appellant and the 1st respondent had negotiated on, over a period of time. There was an element of trust between the parties, that no one will renege on the terms agreed upon on the working draft. The period between the working draft and the facility agreement was 29 days. DW1, unwittingly thought it safe to assume that there would be no substantial amendments from the terms agreed upon on 1 June 1992.

[22] Further, DW1 was not told by 1st respondent that there was this new amendment to the facility agreement, against what was agreed to initially. This piece of evidence was not controverted in the court blow. And, if we accept the version of DW1 in print that he was informed by PW2 that the terms of the facility agreement were the same as the contents of the working draft, before he signed it, then it stands to reason why DW1 was almost blasé about the signing of the facility agreement. He had basically believed the word of PW2 in this respect.

[23] Against this backdrop, we find that it was plausible for DW1 to have safely assumed that the facility agreement was in compliance with the working draft of 1 June 1992, when he signed the said facility agreement on 30 June 1992.

[24] It is our considered view, that there was an elementary obligation on the part of the 1st respondent, as bankers to inform the 5th appellant as customers of theirs, of the substantial change that they had inserted in the facility agreement. The bank had in this case, executed the facility agreement by shutting its eyes to the obvious fact that they had varied the facility agreement, without the consent of the 5th appellant. It was not in issue that DW1 relied upon and trusted PW2 at the material time. There was also no evidence adduced that PW2 had advised DW1 to seek for independent advice prior to the execution of the facility agreement. It should also be remembered that the 'relationship of banker and customer may be said to begin the moment the parties enter into relationships or negotiations which are considered part of the contract, ultimately concluded. The negotiations must be

part of the process and lead directly to agreement; negotiations without agreement cannot establish the relationship'. (See *Paget's Law of Banking* 9th edn). In the present appeal it was not in dispute that indeed prior to the execution of the facility agreement there was negotiation as evidenced by the working draft and which terms were supposed to be incorporated into the facility agreement. Hence, even before the execution of the facility agreement there was already a relationship formed between the parties. In such a situation it was therefore de rigueur for PW2 to inform DW1 on the variations made or the departure from the agreed terms in the working draft. Thus, the failure to do so in our view amounts to a fundamental breach of duty of care on the part of PW2 and vicariously the 1st respondent.

[25] We also find it intriguing why, after having negotiated with the 5th appellant over a considerable period of time and finally agreeing to a working draft, that the respondent would do a complete volte-face, without informing the 5th appellant. Was it done in the pious hope that the 5th appellant may not stumble upon it in the agreement? In this instance, the 5th appellant did just that. If this is the case, then it is conduct that we do not propose to countenance from a financial institution.

[26] These we find are probabilities and possibilities that should have been taken into account by the trial judge. If he had considered these probabilities and possibilities and then chose to disregard it, we would have accepted his assessment and findings. However, his failure to do so impeaches his very findings on this matter and invites appellate intervention.

[27] What we also find slightly discomfiting is that the trial judge had held that even if the 1st respondent had misrepresented to the 5th appellant that there was no amendment to the facility agreement and the 5th appellant in reliance of this representation signed it, there was no question of impropriety on the part of the 1st respondent as bankers. There was still a duty, the trial judge held on the part of the 5th appellant to scrutinize the agreement. We simply cannot accept this proposition.

[28] To our minds, if a bank executes an order knowing it to be dishonestly given, or shuts its eyes to an obvious fact of dishonesty, or acted recklessly in failing to disclose material facts, the bank will plainly be liable. In our judgment, it is an implied term of the contract between the bank and the customer that the

bank will observe reasonable skill and care in and about executing customer's orders. See *Barclays Bank plc v. Quincecare Ltd* [1992] 4 All ER p. 363.

[29] Reverting to the facts of the present case the trial judge had de-emphasized the importance of the working draft, agreed upon by both the parties, after a series of negotiations. To him, it was merely a pre-contractual document that did not deserve much weight.

[30] We however, take a diametrically opposing view on this. We find this working draft an important document, bearing in mind that it was the evidence of DW1, PW1 and PW2, of the importance of this working draft and the fact that the facility agreement was to formalize what was agreed upon by the parties, in the working draft. The trial judge's reliance on the case of *Prenn v. Simmonds (supra)* and *Keng Huat Film Co. Sdn Bhd (supra)*, is thus misplaced in this instance.

[31] The trial judge has also in fortifying his assessment of the witnesses, held to the view, that the method of disbursement, pursuant to the working draft was not proper, in the light of the agreement between the 5th appellant and Messrs, Rheinhold & Mahla AG.

[32] In this context, the trial judge referred to art. 3 of the said agreement, on the method of payment. We have referred to the said art. 3 previously. The working draft may have been at odds with this particular agreement, but it should not distract one from the fact, that it is the terms of the working draft of 1 June 1992 that we should take into account at this juncture. The parties may have been well aware of art. 3 of the said agreement, when the working draft was drafted and agreed upon. To now rely on the said art. 3, as a means of doubting the integrity and workability of the working draft, is plain subterfuge on the part of the 1st respondent. Further, a bank is supposed to treat the customer's mandate at its face value, save in extreme cases. A bank is not obliged to question any transaction which is in accordance with the customer's mandate, unless there are grounds for believing that these was a misuse of authority for the purpose of committing a fraud. See *Lipkin Gorman (a firm) v. Karpnale Ltd and Another* [1992] 4 All ER 409. Hitherto, there is no question of fraud or misuse of authority on the part of the 5th appellant as regards this mandate.

[33] In the final analysis, we hold that the conduct of the 1st respondent in relation to the amendment of the facility agreement, is in breach of their duties as bankers to their customers.

Did The 5th Appellant Know That The Monies Were Eventually Disbursed In One Draw Down?

[34] Having set the stage, briefly what followed was a natural consequence of the signing of the facility agreement. The 1st respondent had remitted a sum of RM20 million in one draw down to the account of R&M. The 5th appellant was unaware of this draw down until much later. The 1st respondent contends, otherwise.

[35] The trial judge had cited reasons why 5th appellant must have been aware of this draw down even before August 1992, when he was informed of the draw down by the 1st respondent. The reasons of the trial judge can be gathered from the grounds of judgment. It can be paraphrased as follows:

(1) That three days after the facility agreement was signed, DW1 had written to Bank Negara, *vide* letter of 3 July 1992 for approval to remit RM20 million to Dresdner Bank of Germany to the account of R&M. Bank Negara had replied raising a query, about why the 5th appellant was to make an advance payment of RM20 million in full and not in the form of installments, following the stages of completion of the construction. There was an undisputed reply to this by DW1, *vide* a letter of 16 July 1992. From this narration, it was his observation that DW1 was very much in the know of the full remittance of RM20 million on 21 July 1992. It was unlikely, according to the trial judge that DW1 has come to know of the said remittance only towards August 1992.

(2) The fact that when DW1, was made aware of the remittance of RM20 million in August 1992, he had not thought it necessary to lodge a formal protest in writing to the 1st respondent, but merely made oral objections to PW2. He was pacified when informed by PW2, that a performance bond and letter of undertaking were already obtained from R&M.

(3) That the interest rate on the said remittance of RM20 million was duly paid by the 5th appellant, without a demur in October of 1992.

[36] Against these findings, the trial judge had come to a conclusion that remittance of RM20 million was done with the knowledge or was acquiesced by the 5th appellant.

Our Findings In This Respect

[37] As to the remittance of RM20 million on 21 July 1992, we find the lack of a formal written protest by DW1, a non-issue. The fact remained, that it was not disputed that DW1 had lodged a protest and was pacified by PW2 that there was nothing to worry about, as the performance bond and the letter of undertaking were obtained from R&M already.

[38] We also find, that if the said DW1 had an inkling that the remittance of RM20 million was made on 21 July 1992, there was no reason for him then to have protested in August 1992. There was nothing to suggest that when he did protest, he was then told by PW2 to stop the charade, as he (DW1) was well aware that the monies have already been remitted. In fact, to reiterate, PW2 had to pacify him that there was no need to worry as the performance bond and letter of undertaking were already obtained from R&M. Such conduct on the part of both parties does not show knowledge of DW1 about the unapproved remittance. This aspect of DW1's conduct was not analysed by the trial judge.

[39] The payment of the interest rate, despite the unlawful remittance can be put down to one reason. The 5th appellant was presented with *fait accompli*, there was nothing to be done, save to service the interest and yet preserve and pursue their rights to legal remedies. This was yet another possibility that the trial judge had failed to consider. The servicing of the interest should not to our minds, be considered as act of acquiescence.

[40] The letter to Bank Negara by DW1 was on the instructions of PW2. This was not disputed. It was imperative for the approval to be obtained for remittances of any monies outside Malaysia. The fact that it mentioned the sum of RM20 million was because that was the sum that was eventually going to be paid into the account of R&M, in Germany, albeit, in 2 stages. Further, after the release of the loan on 21 July 1992, PW2 had on 27 July 1992 faxed a letter to the 5th appellant instructing him to write again to Bank Negara. If the approval of Bank Negara was not required, there would be no necessity for PW2 to fax this draft letter to the 5th appellant after the release of the loan.

[41] These letters to Bank Negara do not in any way impute any knowledge on the part of DW1 or the 5th appellant of the remittance on 21 July 1992. At its highest, they are merely letters of formality written on the instructions of PW2, to get the bank's clearance about remittance outside the country.

[42] In our judgment there was much conjecturing on the part of the trial judge whether in fact, DW1 had knowledge of the remittance on 21 July 1992. If the trial judge had considered the undisputed evidence that DW1 had protested to PW2 about the remittance when he discovered it later and had to be pacified, he may have come to a different conclusion.

Compliance With Schedule 4 Of The Drawing Notice

[43] The 5th appellant had also complained that the respondents failed to comply with a mandatory requirement before the disbursement of the loan to R&M on 21 July 1992. The said Schedule 4, drawing notice was prerequisite for the release of the loan.

[44] The 5th appellant referred to cl. 1(d) of Schedule 4 dated 13 July 1992.

[45] The said Schedule 4 is reproduced for convenience and states as follows:

> (a) give you notice that we wish to make a Drawing of Ringgit (M$20,000,000) on the Facility on July 21, 1992;
>
> (b) request you to remit the Drawing to account no. 6-594-803 of the Contractor with Dresdner Bank AG at Mannheim;
>
> (c) confirm that:
>
> (i) each of the conditions contained in clause 5.1(a), (c), (d), and (e) is satisfied as at the date hereof and we know of no reason why it should not be satisfied as at the date referred to in (i) (a) above;
>
> (ii) the Drawing is required to pay for the machinery to be supplied by the Contractor under the terms of the Construction Contract;
>
> (d) enclose herewith:
>
> (i) the certificate of Contractor certifying completion of the machinery in compliance with the terms of the Construction Contract and its request for payment;

(ii) the certificate of the Project Consultants certifying that the machinery referred to in

(i) above:

(aa) comprise all (and not more or less) of the machinery to be supplied under the terms of the Construction Contract;

(bb) conform in all respects with the terms of the Construction Contract;

(iii) certificate of the Contractor certifying the whole of the balance payable under the terms of the Construction Contract as at the date referred to in (a) above;

[where the amount set out in the request referred to in (i) above exceeds the amount of the Drawing;

(iv) the difference between the Drawing and the amount payable to the Contractor];

CARAH ENTERPRISE SDN. BHD.

by sgd.

[46] It was the contention of the 5th appellant that the three certificates required under para. (i), (ii) and (iii) were not obtained when the loan of RM20 million was disbursed on 21 July 1992.

Trial Judge's Assessment Of This Evidence

[47] The learned trial judge expressed reservations to this contention of the 5th appellant and his reasons for doing so are found on pp. 42 to 45 of the translated grounds of judgment:

The Court felt rather surprised with the aforesaid contention made by Carah. Schedule 4 is the document or notice which was issued by Carah itself, addressed to Perdana for requesting the release of the loan in accordance with Clause 5 of the Facility Agreement. The said Schedule was signed by DW1 himself. The important part to this issue in the Schedule 4 is as follows:

We hereby:

(a) give you notice that we wish to make a Drawing of Ringgit (RM 20,000,000) on the Facility on July 21, 1992;

(b) request you to remit the Drawing to account no. 6-594-803 of the Contractor with Dresdner Bank AG at Mannheim;

(c) confirm that –

(i) each of the conditions contained in clause 5.1(a), (c), (d) and (e) is satisfied as at the date hereof and we know of no reason why it should not be satisfied as at the date referred to in i(a) above;

(ii) the Drawing is required to pay for the machinery to be supplied by the Contractor under the terms of the Construction Contract;

(d) enclose herewith:-

(i) the certificate of the Contractor certifying completion of the machinery and compliance with the terms of the Construction Contract and its request for payment;

(ii) the certificate of the Project Consultants certifying that the machinery referred to in (i) above:-

(aa) comprise all (and not more or less) of the machinery to be supplied under the terms of Construction Contract;

(bb) conform in all respects with the terms of the Construction Contract;

(iii) certificate of the Contractor certifying the whole of the balance payable under the terms of the Construction Contract as at the date referred to in (a) above;

[where the amount set in the request referred to in (i) above exceeds the amount of the Drawing;

(iv) the difference between the Drawing and the amount payable to the Contractor].

From the said notice, it is very clear (jelas sekali) that Carah had enclosed all the three certificates in accordance with para (d) where it is stated "enclose herewith:" – DW1 spoke English fluently. He was not forced to or threatened by anyone to produce the said certificates. The responsibility for 'obtaining' (mengadakan) the certificates is the responsibility of Carah, not the responsibility of Perdana, and in the Schedule 4 Carah had stated in paragraph (d) that the relevant certificates had been enclosed. It is surprising that, under such circumstances, Carah still contended that Perdana had disbursed the relevant loan without the certificates. In his evidence in Court, DW1 had stated that the Schedule 4 was signed by him in blank on the request of PW2

(PW2 had denied that statement and stated that he had never done so). According to DW1, he was requested by PW2 to sign Schedule 4, Schedule 4A and Schedule 4B in blank, without the particulars being filled up. (Schedule 4A and 4B had no relevance to the Facility Agreement. Both Schedule 4A and 4B were concerned with `Working Draft' dated 1 June 1992) Once again the Court felt the lack of confidence with the truth of this contention because it is not reasonable that PW2 as an experienced bank officer request DW1 to sign Schedule 4A and 4B which had no direct relevance with the Facility Agreement. Schedule 4 was actually signed by DW1 himself. If it is true that PW2 requested DW1 to sign Schedule 4, DW1 cannot thereafter deny its validity because there is no evidence showing DW1 had been threatened, forced or defrauded by anyone at the time of signing the Schedule 4. If there are elements of wrongdoing (kesilapan) and negligence (kecuaian), these are the wrongdoing and negligence of DW1 himself (for Carah). A person cannot use his wrongdoing and negligence for pointing his finger at others. "Whoever eats chilli must feel its hotness." ("Siapa yang makan lada, dialah yang merasa pedas.")

Our Assessment Of The Said Evidence

[48] To our minds, the trial judge seemed to be taken in, by the tenor of the drawing notice of 13 July 1992, that was drawn up by the 5th appellant themselves. More to the point, the trial judge was of the view that the words 'enclose herewith' in cl. (d) of the said Schedule 4, should be given its natural interpretation, that the said certificates were indeed enclosed with the said Schedule.

[49] DW1 had a different story to tell. In his evidence, he stated that he was requested by PW2 to sign a blank Schedule 4 Notice and in fact there were no certificates tendered, pursuant to clause (d) of the 4th Schedule. PW2 denied coercing DW1, to sign a blank Schedule 4 Notice.

[50] The trial judge made no attempt to state whether he believed or did not believe PW2's version that he had not coerced DW1, to sign the blank Schedule 4 Drawing Notice. All that the trial judge was prepared to say was, even if it were true that PW2 had requested DW1 to sign a blank Schedule 4, DW1 cannot thereafter, deny the validity of Schedule 4, as there was no evidence of coercion or fraud on the part of PW2. We have our reservations about the cavalier attitude of the trial judge that it

was immaterial whether PW2 had requested DW1 to sign a blank Schedule 4 drawing notice. What was material to him was that DW1 did sign it, and chose to resile from it now. In our judgment, the act of the bank officer PW2 if it were true, is reckless, lacks probity, and should be deprecated upon.

[51] We have also scrutinized the evidence and found as a fact that all the three certificates mentioned in Schedule 4 drawing notice were not in fact available when the loan was released on 21 July 1992. In fact, the admission came from none other than PW1. He had informed the court below that he had released the loans before getting the certificate certifying completion of the machinery. The certificate of inspection was only obtained in November 1992, after the release of the loan sum.

[52] Similar sentiments were also expressed by PW2, who informed the court below that the loan sum was released before the certificate of the Project Consultant was obtained.

[53] Against this backdrop, we cannot simply disregard the evidence of DW1 that he was instructed to sign blank Schedule 4 drawing notice. There is merit in this contention, as it is borne out by the evidence of both PW1 and PW2, the plaintiff's witnesses. To that end, we hold that the loan was indeed, remitted without compliance of Schedule 4 drawing notice. This, to our minds, is a breach of a fundamental term in the drawing notice which was prerequisite to the release of the loan. In turn there was therefore a fundamental breach of the terms of the financial arrangement as a whole by the 1st respondent.

Appointment Of A Receiver And Manager

[54] It was the contention of the 5th appellant, in the light of the lapses of duty of care and negligence committed by the 1st to 6th respondent, the 5th appellant suffered irreparable damage. The contagion effect of these acts was that the 5th appellant had suffered financial losses. Much of the financial predicament of the 5th appellant was attributed to the non-compliance of the Schedule 4 drawing notice. Flowing from this, the 5th appellant contends actions taken by the respondents such as the uplifting of the fixed deposit of RM 6.6 million of the 5th appellant by the respondents and the appointment of the receiver and manager, was improper and should be accounted for.

[55] On the appointment of a receiver and manager, according to the 5th appellant, they had strenuously objected to the said appointment, *vide* their solicitors' letter of 25 February 1994. The 7th respondent, who was the appointed receiver and manager, had not refuted the evidence of the 5th appellant, that they had challenged his entire appointment.

[56] Once again, we find there is merit in this contention of the 5th appellant. The entire exercise of appointment of the receiver and manager over the assets of the 5th appellant, was brought about in part, because of the manner in which the respondents had handled the loan facility granted to the 5th appellant coupled by, the total lack of compliance with the terms of the Schedule 4 drawing notice.

[57] As a consequence, we hold that the appointment of the 7th respondent as receiver and manager was invalid. He has a duty now, to account for the monies and assets of the 5th appellant.

Conclusion

[58] In answer to the questions posed before us, we answer them in the following manner.

[59] To questions 1(a) and (b), the certificates in question in accordance to Schedule 4 were not available at the material time the loan was disbursed. To that end, we are in agreement that the findings of the trial judge in this respect, deserves our intervention.

[60] To question (2), we hold that the variation in the manner the draw down was done was without the express or implied consent of the 5th appellant. This in itself, constitutes a breach of contract and a breach of duty of care on the part of the 1st respondent.

[61] To question (3), we wish to state that the issue was not addressed at length and we find it is of no material importance *vis-à-vis* the other questions posed to us. As such we decline to make any findings in regard to the question.

[62] To question (4), we hold that it was as a consequence of the aforesaid breaches of the respondents, that the 5th appellant suffered financial problems. Hence, the appointment of the receiver and manager on the assets of the 5th appellant was caused

A entirely by the wrong doings of the respondent themselves. They cannot profit from their own wrongs. The appointment of the receiver and manager was injudicious and should be set aside.

[63] Appeal is allowed with costs here and below. Claims of the B 5th appellant are allowed as follows:

(a) That the remittance of the said loan by telegraph transfer in one drawdown was in breach of the condition precedent of the working draft/drawing notice agreed between the 5th appellant and the said 1st respondent and/or was made C negligently on the part of the 1st respondent.

(b) The 5th appellant is not liable to pay to the 1st respondent and the lenders the said loan and any interest and charges thereon.

D

(c) The delivery up forthwith by the 1st respondent to the 5th appellant of all the security documents for cancellation with consequential directions.

E (d) An order for refund forthwith of all monies due by the 1st respondent to the 5th appellant relating to the cash fixed deposit of RM6.6 million with interest thereon at 8% p.a. from the date of deposit on 10 July 1992 to date of refund to M/s Gulam & Wong as solicitors for 5th appellant.

F (e) Appointment of the 7th respondent as receiver and manager is invalid or otherwise null and void.

(f) An order for a true account and inventory verified by statutory declaration by the 7th respondent of the funds and all other G assets and undertakings of the 5th appellant received, taken or utilized by the 7th respondent in the exercise of his powers as receiver and manager, and for refund/redelivery forthwith to the 5th appellant of all such funds and assets and undertakings with interest at 8% p.a.

H

(g) An order for damages against the 1st and 7th respondents to be assessed and paid to the 5th appellant.

I

[64] A date to be set for an inquiry of damages before the High Court.

[65] My learned brothers Dato' Alauddin bin Dato' Mohd. Sheriff and Dato' Richard Malanjum have read the draft of my judgment and have expressed their agreement with it.